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Vision of Elk River, Inc. and Susie Stetler. Case 18–CA–019200

December 16, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND SCHIFFER

On September 28, 2012, the Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 5. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals vacated the Board's Decision and Order and remanded this case for further proceedings consistent with the Supreme Court's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions, cross-exceptions, and briefs. We have also considered the now-vacated Decision and Order, and we agree with the rationale set forth therein.¹ Accordingly, we adopt the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order reported at 359 NLRB No. 5, which is incorporated herein by reference. The judge's recommended Order, as modified herein, is set forth in full below.²

¹ In finding that the General Counsel proved that the Respondent had knowledge that employee Anne Martin engaged in union activities, we find support in *Metropolitan Transportation Services*, 351 NLRB 657, 658, 710 (2007), in which the Board found that an employer had knowledge of an employee's union sympathies based on evidence that he wore a large union button to a company meeting. We do not rely on *Flex-N-Gate*, 358 NLRB No. 76 (2012), cited in the vacated Decision and Order.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), and to conform to the Board's standard remedial language. We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

ORDER

The National Labor Relations Board orders that the Respondent, Vision of Elk River, Inc., Elk River, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off or otherwise discriminating against employees for supporting the Union or any other labor organization.

(b) Laying off or otherwise discriminating against employees for participating in Board proceedings.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section incorporated by reference in this Decision.

(c) Compensate Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

Our dissenting colleague raises one point not addressed in the earlier decision. He cites the fact that the Respondent gave a positive professionalism score to one member of the Union's organizing committee, which he asserts undermines our conclusion that the General Counsel proved that the Respondent laid off the five discriminatees because of their union activities. However, it is well settled that the General Counsel need not prove that an employer discriminated against all union supporters to establish that it discriminated against some. See, e.g., *Handicabs, Inc.*, 318 NLRB 890, 897–898 (1995) (“[a]n employer's failure to discriminate against every [employee who engaged in protected activity] does not disprove a conclusion that it discriminated against one of them,” and collecting relevant cases), enfd. 95 F.3d 681 (8th Cir. 1996). Accord: *Living Spoonful, Inc.*, 361 NLRB No. 52, slip op. at 1 fn. 3 (2014).

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs, and within 3 days thereafter notify Edick, Lynas, Martin, Stetler, and Walberg in writing that this has been done and that the layoffs will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its Elk River, Minnesota facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since August 31, 2009.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 16, 2014

Mark Gaston Pearce, Chairman

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In 2009, the Respondent's client, the Elk River School District, mandated changes to bus routes that required the Respondent to lay off five employees. It is undisputed that union activity played no role in the Respondent's decision to lay off five employees. However, the General Counsel alleged that the Respondent selected the five alleged discriminatees for layoff because of their long-past union activities (and also that it selected three of those five in part because of their participation in long-settled or withdrawn unfair labor practice charges). For the reasons set forth in the dissenting opinion of former Member Hayes, 359 NLRB No. 5, slip op. at 9-14, I would adopt the judge's decision dismissing the complaint in its entirety.¹ In particular, I believe the majority's unfair labor practice findings are undermined by the following considerations.

First, only one of the five alleged discriminatees, Sharon Lynas, played more than a minor role in the Union's unsuccessful organizing campaign back in 2007. The General Counsel failed to prove that the Respondent even knew about the minor union activities of Anne Martin, Susie Stetler, and Susan Walberg when it decided to lay them off.

Second, the statements relied upon by the majority as evidence of union animus were made 2 years before the layoffs at issue, and numerous decisions (cited in former Member Hayes' dissent) establish that statements that remote in time do not support a causal nexus between union activity and adverse employment action.

¹ Member Hayes served on the Board after being nominated by the President and confirmed by the Senate. The validity of his appointment was not called into question by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

Third, the statements were made by two managers, one of whom played no role in the layoff decisions and was absent from the workplace for health reasons when they were made, and the other of whom played only a ministerial role, merely recording employees' performance scores calculated by a different manager in order to select the five poorest performers for layoff. Further, the statements themselves are ambiguous and reasonably susceptible to interpretations that do not betray any union animus.

Fourth, there is no evidence that any of the Respondent's employees, including the alleged discriminatees, engaged in any union activity in the 2 years between the September 2007 Board election and the August 2009 layoffs.

Fifth, while the Respondent made several errors when calculating employees' attendance scores, those mistakes actually *benefited* Stetler, Walberg, and Trudy Edick by giving them higher scores than they deserved. And, although Lynas should have received 5 additional attendance points, she would have been among the five lowest-scoring employees even if her score had been calculated accurately. Thus, the errors reveal no bias or animus against union supporters.

Sixth, while "professionalism," one of the three criteria used by the Respondent to evaluate employees for layoff, involved some subjective judgment, use of a subjective criterion does not itself evidence union animus. Further, the General Counsel did not prove that the Respondent manipulated professionalism scores to retaliate against the alleged discriminatees for their protected activities. I note here that the Respondent gave a perfect professionalism score of 20 to employee Julie Thornton, who, unlike four of the alleged discriminatees, actually served on the Union's organizing committee in 2007, of which the Respondent was well aware.

Seventh, Stetler and Martin received subpoenas to testify in an unrelated Board case that settled more than a year before the layoffs, and neither employee ever testified against the Respondent's interests. Additionally, while the Respondent's agents perceived that Edick had played some role in a third unfair labor practice charge filed by the Union in 2008, the Union withdrew that charge long before the layoff decisions at issue. None of the General Counsel's evidence establishes that the Respondent harbored any animus toward employee participation in Board proceedings.

For the above reasons and for those explained more fully in former Member Hayes' dissent, I believe that the General Counsel has not satisfied his burden of proving that the Respondent selected any of the five alleged discriminatees for layoff because of their protected activ-

ities. I would therefore affirm the judge's decision and dismiss the complaint in its entirety. Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 16, 2014

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT lay off or otherwise discriminate against you for participating in Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL compensate Trudy Edick, Sharron Lynas, Anne Martin, Susie Stetler, and Susan Walberg for the adverse tax consequences, if any, of receiving a lump-

sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of those employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

VISION OF ELK RIVER, INC.

The Board's decision can be found at www.nlr.gov/case/18-CA-019200 or by using the QR code

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

